

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

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6
7 August Term 2000

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9 Argued: March 19, 2001 Decided: May 11, 2001

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12 Docket No. 00-4061

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14 -----X

15
16 MING LAM SUI,

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18 Petitioner,

19
20 - against -

21
22 IMMIGRATION AND NATURALIZATION SERVICE,

23
24 Respondent.
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27 -----X
28

29 Before: FEINBERG, NEWMAN, and SACK, Circuit Judges.

30 Petition for review of a final order of the Board of
31 Immigration Appeals, which affirmed the decision of an immigration
32 judge who found that Sui was subject to removal as an alien who
33 had committed an aggravated felony. Held, Sui's prior conviction
34 was not properly classified as an "attempt," and so was not an
35 aggravated felony.

36 Petition for review granted. Decision of the Board of
37 Immigration Appeals vacated.

1 THEODORE N. COX, New York, NY, for Petitioner.

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3 MEREDITH E. KOTLER, New York, NY (Mary Jo White,
4 United States Attorney for the Southern District
5 of New York, Gideon A. Schor, of counsel), for
6 Respondent.
7

8 FEINBERG, Circuit Judge:

9 Ming Lam Sui (Sui) petitions for review of a Board of
10 Immigration Appeals (BIA) decision dismissing his appeal of a
11 removal order issued by an immigration judge (IJ) who found Sui
12 deportable as an alien convicted of an aggravated felony under 8
13 U.S.C. § 1227(a)(2)(A)(iii). Specifically, the IJ and the BIA
14 found that Sui had been convicted of an attempt to commit an
15 offense that involves fraud or deceit in which the loss to victims
16 exceeds \$10,000 and thus had been convicted of an aggravated
17 felony as defined in 8 U.S.C. §§ 1101(a)(43)(M)(i),
18 1101(a)(43)(U).
19

20 I. Background

21 A. Sui's federal conviction

22 Sui immigrated to the United States from China in 1990 when
23 he was 15 years old. In May 1997, in the United States District
24 Court for the Western District of Wisconsin, he pleaded guilty to
25 a one-count indictment charging him with knowingly and unlawfully
26 possessing counterfeit securities with the intent to deceive

1 another in violation of 18 U.S.C. § 513(a). Specifically, the
2 indictment alleged that Sui possessed approximately 227
3 counterfeit Chase Visa traveler's checks with a total face value
4 of approximately \$22,700. The Presentence Investigation Report
5 (PSR) prepared in connection with Sui's sentencing described the
6 underlying circumstances of Sui's conviction as follows. In
7 February 1997, Wisconsin State Troopers stopped a car in which Sui
8 and a companion were traveling near Eau Claire, Wisconsin, after
9 the troopers clocked it at 82 miles per hour. When the troopers
10 approached the car, they noted that it was filled with "a large
11 amount of merchandise, shopping bags, and cartons of cigarettes."
12 The troopers asked if they could search the car for drugs or large
13 sums of money, and Sui consented. Ninety-eight \$100 Chase Visa
14 traveler's checks were found in the car, and a call to Visa
15 established that the checks were counterfeit.

16 Sui and his companion were arrested, and 105 \$100 checks were
17 found on Sui in a search incident to arrest. During booking, a
18 further 23 \$100 checks were found in Sui's possession. The Secret
19 Service subsequently recovered 47 \$100 checks that had been passed
20 by Sui and his companion at 13 businesses in Wisconsin. Not all
21 the counterfeit checks cashed by Sui were recovered by the Secret
22 Service, but three more victim businesses were identified, with

1 losses of \$1,769.43.¹

2 According to the PSR, Sui told the Probation Office that he
3 was on his way to a shopping mall in Minnesota with the checks.
4 Sui's companion indicated that they planned to buy as much
5 merchandise as possible at the Minnesota mall and then bring it
6 back to New York to sell it. Sui did not object to these portions
7 of the PSR. In July 1997, Sui was sentenced to 16 months
8 imprisonment and ordered to pay \$8,664.43 in restitution.

9
10 *B. Immigration proceedings*

11 As a result of this conviction, the Immigration and
12 Naturalization Service (INS) instituted removal proceedings
13 against Sui, charging that he was subject to removal pursuant to 8
14 U.S.C. § 1227(a)(2)(A)(iii)² as an alien who had been convicted of
15 an aggravated felony as defined in the Immigration and
16 Naturalization Act (INA), 8 U.S.C. § 1101(a)(43).³ That definition

¹ The indictment addressed only the 227 checks found in the vehicle and on Sui's person; it did not reflect the 47 checks recovered by the Secret Service or the other identified losses.

² Section 1227(a)(2)(A)(iii) states, "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

³ The portions of § 1101(a)(43) relevant to this opinion are as follows:

The term "aggravated felony" means . . .

(continued...)

1 section of the INA lists 21 subsections, each identifying one or
2 more offenses qualifying as an "aggravated felony." However, the
3 initial INS document charging Sui, dated October 29, 1997, did not
4 identify the particular aggravated felony statutory subsection
5 under which the INS sought Sui's removal. In July 1998, the IJ,
6 rejecting the INS position, determined that Sui's conviction did
7 not fall within the definition of an aggravated felony contained
8 in subsection (D) of § 1101(a)(43), that is, "an offense described
9 in section 1956 of Title 18 (relating to laundering of monetary
10 instruments) or section 1957 of that title (relating to engaging

(...continued)

- (D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded \$10,000; . . .
- (G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year; . . .
- (M) an offense that-
 - (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or
 - (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000; . . .
- (U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

1 in monetary transactions in property derived from specific
2 unlawful activity) if the amount of the funds exceeded \$10,000."
3 The IJ then adjourned the hearing to give the INS time to amend
4 the charging document to identify other charges that would qualify
5 as an "aggravated felony."

6 On December 9, 1998, the INS served a new charging document
7 on Sui, which alleged that he was subject to removal as an alien
8 convicted of an aggravated felony as described in subsection
9 (M)(i) of § 1101(a)(43), that is, "an offense that involves fraud
10 or deceit in which the loss to . . . victims exceeds \$10,000."
11 Thereafter, at a hearing in March 1999, the IJ also asked for
12 briefing regarding (1) whether the conviction fell under
13 subsection (G) as a theft offense or burglary offense for which
14 the term of imprisonment is at least one year and (2) whether the
15 conviction might fall under any other subsection of § 1101(a)(43).⁴

16 In May 1999, the INS submitted a brief to the IJ arguing that
17 Sui was removable both under subsection (G) and under subsections
18 (M)(i) and (U) of § 1101(a)(43). Subsection (U) provides that a

⁴ The IJ also indicated that at the next hearing he would rule on whether Sui's conviction fell under subsection (F), but this seems best understood as a slip of the tongue or a transcription error, since subsection (F) refers to "a crime of violence . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Sui's crime was clearly not a crime of violence, and subsection (F) was not addressed at any subsequent hearing.

1 conviction for "an attempt or conspiracy to commit" any of the
2 offenses described in the other 20 subsections of § 1101(a)(43) is
3 an aggravated felony conviction. Although the actual loss to
4 victims in Sui's case was only \$8,664.43, the INS argued that
5 Sui's conviction should be understood as an attempt to undertake a
6 crime of fraud or deceit in which the loss to victims would exceed
7 \$10,000. Sui responded to these arguments in writing and at a
8 hearing in early June. On June 23, 1999, the IJ held in a written
9 opinion that even though the actual loss to victims in Sui's case
10 was less than \$10,000, Sui's conviction constituted an aggravated
11 felony under subsections (U) and (M)(i), considered together, as
12 an attempt to commit an offense involving fraud or deceit in which
13 the loss to victims would be over \$10,000. In addition, the IJ
14 rejected the INS's subsection (G) argument. The IJ thereafter
15 ordered Sui's removal, and Sui's motion for reconsideration was
16 denied. The BIA accepted the IJ's analysis and dismissed Sui's
17 appeal. This petition for review followed.

18 19 **II. Analysis**

20 In his petition, Sui argues to us principally that he is not
21 removable under subsection (U) of § 1101(a)(43) as it relates to
22 subsection (M)(i) because even if his conduct in fact constituted
23 an attempt to defraud victims of more than \$10,000, he was not

1 convicted of an offense denominated as an "attempt," and therefore
2 subsection (U) is inapplicable. He also argues that the INS
3 charging documents failed to notify him of the charges against him
4 in violation of the Constitution and federal regulations. Because
5 we conclude, for reasons somewhat different from Sui's, that Sui
6 is not removable pursuant to subsection (U), we do not reach the
7 constitutional question.

8
9 *A. Jurisdiction*

10 The Illegal Immigration Reform and Immigrant Responsibility
11 Act of 1996 (IIRIRA) stripped the federal courts of jurisdiction
12 to review any final removal order against an alien "who is
13 removable by reason of having committed" an aggravated felony. 8
14 U.S.C. § 1252(a)(2)(C). However, this court retains jurisdiction
15 to review the underlying jurisdictional fact at issue--namely,
16 whether Sui has been convicted of an aggravated felony. *Bell v.*
17 *Reno*, 218 F.3d 86, 89-90 (2d Cir. 2000). The jurisdictional
18 inquiry thus merges with the question on the merits: If Sui is in
19 fact removable because he was convicted of an aggravated felony as
20 defined by subsection (U) and subsection (M)(i), we must dismiss
21 his petition for lack of jurisdiction, while if he is not
22 removable under these subsections, we may exercise jurisdiction
23 and vacate the order of removal. *See id.*; *Ye v. INS*, 214 F.3d

1 1128, 1131 (9th Cir. 2000).

2
3 *B. Waiver*

4 Before turning to the merits, we must address the INS's
5 contention that Sui has waived his argument regarding the
6 inapplicability of subsection (U). The INS asserts that Sui never
7 claimed before the IJ or the BIA that subsection (U) did not apply
8 to him because he had not been formally convicted of an "attempt"
9 to commit a crime.

10 During the INS proceeding, in reply to the INS's contention
11 that under *In Re: Onyido*, Int. Dec. No. 3379, 1999 WL 126436 (BIA
12 Mar. 4, 1999), Sui was removable pursuant to subsection (U), he
13 argued that *Onyido* was not controlling in his case. Sui's
14 argument stressed that in *Onyido*, the alien found deportable under
15 subsection (U) had actually presented a fraudulent insurance claim
16 for payment, thus taking a "substantial step" toward commission of
17 the ultimate fraud, rather than merely possessing the fraudulent
18 materials. Sui also argued in his brief that in *Onyido*, attempt
19 was a lesser included offense of the fraud crime of which the
20 alien had been convicted, which was not true in Sui's case.
21 Similarly, in oral argument before the IJ, Sui's counsel
22 emphasized the difference between Sui's possession of counterfeit
23 checks and *Onyido*'s actions, arguing that possession, in contrast

1 to presenting a false claim, did not constitute a "substantial
2 step" toward commission of the fraud crime. While Sui did not
3 explicitly argue before the IJ that he had not been formally
4 charged with the crime of "attempt," he clearly argued that his
5 conviction did not constitute an attempt under subsection (U), and
6 he also argued that attempt was not a lesser included offense
7 under his statute of conviction.

8 In his appeal to the BIA, Sui simply stated that "[t]he IJ
9 erred as a matter of law by finding that respondent is an
10 aggravated felon and pretermittting all applications for relief"
11 and noted that he reserved all constitutional issues. He did not
12 file a memorandum in support of his appeal prior to the deadline
13 set by the BIA.⁵ Nevertheless, by filing his appeal and arguing
14 that the IJ erred as a matter of law in finding that Sui was an
15 aggravated felon, which the IJ found pursuant to subsection (U),
16 we find that Sui sufficiently preserved his argument that his
17 conviction did not constitute an "attempt." This conclusion is
18 supported by the decision of the BIA, which explicitly addressed
19 whether Sui's actions constituted an "attempt" to commit the fraud

⁵ Sui's counsel submitted a brief and a motion to accept the memorandum out of time on November 10, 1999, more than two weeks after the October 25, 1999, deadline, asking that the BIA accept the brief out of time because counsel's wife had given birth to a child on October 23. The BIA denied the motion to accept the brief and returned it.

1 defined in subsection (M)(i). We therefore find that Sui has not
2 waived his arguments regarding the applicability of subsection
3 (U).
4

5 *C. Standard of Review*

6 Our research has disclosed no published opinion considering
7 whether an alien may be removed pursuant to subsections (U) and
8 (M)(i) when he or she has not been convicted specifically of an
9 offense formally denominated as an "attempt," but only of another
10 offense involving fraud or deceit, where the facts related to that
11 other offense arguably permit the conclusion that he or she did
12 attempt to defraud victims of more than \$10,000. A divided BIA,
13 however, answered this question in the affirmative by a vote of 10
14 to 5 in *Onyido*, holding that an alien who was convicted of
15 submitting a false insurance claim in the amount of \$15,000 with
16 intent to defraud was deportable under subsection (U) and
17 subsection (M)(i) although no actual loss had occurred and the
18 alien had not formally been convicted of an "attempt" to commit a
19 crime. Int. Dec. No. 3434 at 3-4. In affirming the IJ's decision
20 in the present case, the BIA relied on *Onyido*, and the INS argues
21 that the BIA's interpretation of the INA in *Onyido* and in the
22 present case is entitled to deference under *Chevron U.S.A., Inc.*
23 *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1 Sui, on the other hand, argues that the question of whether he is
2 removable pursuant to subsection (U) is a "pure question of law"
3 and thus subject to *de novo* review. The first question we must
4 face, therefore, is the level of deference to which the BIA's
5 conclusions and interpretations are entitled in this case.

6 As is well-established, *Chevron* requires reviewing courts to de
7 to an agency's interpretation of the statute it administers when
8 the intent of Congress is unclear and the agency's interpretation
9 is reasonable. See *Bell v. Reno*, 218 F.3d at 90. Nevertheless,
10 several circuits have concluded, either implicitly or explicitly,
11 that the BIA's determination that a particular conviction
12 qualifies as an aggravated felony is entitled to no particular
13 deference. See *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir.
14 2001); *Lopez-Elias v. Reno*, 209 F.3d 788, 790 (5th Cir. 2000);
15 *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1072 (9th Cir. 2000);
16 *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997);
17 *Ramsey v. INS*, 55 F.3d 580, 582 (11th Cir. 1995); but see *Le v.*
18 *United States Attorney General*, 196 F.3d 1352, 1353 (11th Cir.
19 1999). The Ninth Circuit comes to this conclusion by reasoning
20 that since the BIA has no special expertise in interpreting state
21 and federal criminal statutes and since interpretation of these
22 statutes has not been consigned to BIA's discretion, reviewing
23 courts do not owe deference to the BIA's analysis of these

1 statutes and their application to the immigration laws. Albillo-
2 Figueroa, 221 F.3d at 1072; Coronado-Durazo, 123 F.3d at 1324; but
3 see Luu-Le v. INS, 224 F.3d 911, 913 (9th Cir. 2000). Other
4 circuits have held that since the question of whether a conviction
5 is an aggravated felony is a jurisdictional analysis under the
6 IIRIRA, the issue is reviewed *de novo*, since "the determination of
7 . . . jurisdiction is exclusively for the court to decide."
8 Lopez-Elias, 209 F.3d at 791; see also Lara-Ruiz, 241 F.3d at 939.

9 While this court has not previously addressed the role of
10 *Chevron* deference in reviewing an aggravated felony determination
11 made by the BIA, it has recently considered analogous questions in
12 reviewing the BIA's determination that an alien was removable
13 pursuant to 8 U.S.C. § 1227(a)(2)(E)(i) because he had been
14 convicted of a "crime of domestic violence," *Sutherland v. Reno*,
15 228 F.3d 171,173-74 (2d Cir. 2000), and pursuant to 8 U.S.C. §
16 1227(a)(2)(A)(ii) because he had been convicted of multiple
17 "crimes involving moral turpitude," *Michel v. INS*, 206 F.3d 253,
18 262 (2d Cir. 2000). In *Michel*, we affirmed the BIA's
19 interpretation of the term "moral turpitude" under the *Chevron*
20 standard, finding that the BIA had considered its interpretation
21 in a reasoned and detailed fashion and that its interpretation was
22 reasonable. 206 F.3d at 262-63. Nevertheless, in determining
23 whether the elements of a conviction under New York law for

1 possession of stolen property met the BIA's interpretation of
2 "moral turpitude," we undertook *de novo* review. This is because
3 "where the BIA is interpreting . . . the INA, *Chevron* deference is
4 warranted, but where the BIA is interpreting state or federal
5 criminal laws, we must review its decision *de novo*" since the BIA
6 is not charged with the administration of these laws. *Michel*, 206
7 F.3d at 262. This conclusion was reaffirmed in *Sutherland*, 228
8 F.3d at 174-75.

9 We believe the reasoning set out in *Michel* and *Sutherland* is
10 equally applicable here. The BIA has made two subsidiary
11 decisions in determining that Sui has committed an aggravated
12 felony. First, the BIA has determined that subsection (U) does
13 not use the word "attempt" to mean conviction of an offense
14 formally denominated as an attempt, but instead means conduct that
15 satisfies a generally accepted definition of an attempted offense.
16 Second, the BIA has, in effect, determined that the offense for
17 which Sui was convicted under 18 U.S.C. § 513(a) meets the BIA's
18 interpretation of an attempt. The first decision involves a
19 construction of subsection (U) entitled to *Chevron* deference if
20 reasonable. The second decision, as in *Michel* and *Sutherland*,
21 does not, and we review it *de novo*.⁶

⁶ It is perhaps arguable that in determining whether Sui's
(continued...)

1
2 *D. Merits*

3 The broad question before us is whether, as the BIA and IJ
4 found, Sui's conviction for possession of counterfeit securities
5 constitutes an attempt to commit an offense involving fraud or
6 deceit in which the loss to victims is greater than \$10,000,
7 pursuant to subsections (U) and (M)(i) of § 1101(a)(43). As just
8 indicated, this broad question involves two subsidiary questions:
9 what is the meaning of "attempt" in subsection (U) and does Sui's
10 underlying conviction fall within that definition?⁷ The first step
11 in determining whether the BIA's interpretation of subsection (U)
12 in this context is entitled to deference is to ask whether
13 "Congress has directly spoken to the precise question at issue,"
14 Chevron, 467 U.S. at 842, since neither an agency nor the courts
15 may disregard clear Congressional intent. The INA states that

(...continued)

offense constituted an attempt, the BIA engaged in ordinary historical fact-finding by an administrative agency, which is traditionally entitled to deference if supported by substantial evidence. See, e.g., Valicenti Advisory Servs., Inc. v. SEC, 198 F.3d 62, 64-65 (2d Cir. 1999). However, the INS does not so argue. Moreover, even if the INS did argue that the BIA's determination here was the sort of fact-finding generally entitled to deference, we would not agree that the BIA is entitled to undertake such fact-finding in this context, as will be seen below. See *infra* note 10 and accompanying text.

⁷ At oral argument, counsel for the INS characterized the relevant question as whether the crime of which Sui was convicted "fit within" the definition of an aggravated felony.

1 "Any alien who is convicted of an aggravated felony at any time
2 after admission is deportable," 8 U.S.C. § 1227(a)(2)(A)(iii),
3 and, as noted above, defines "aggravated felony" to include an
4 "attempt or conspiracy" to commit a variety of offenses, including
5 an offense involving "fraud or deceit in which the loss to . . .
6 victims exceeds \$10,000," 8 U.S.C. § 1101(a)(43)(U), (M)(i). See
7 *supra* note 3. While a conviction is clearly required, the term
8 "attempt" is not defined in the INA, and legislative history does
9 not shed light on the meaning intended by Congress.

10 The second step of the *Chevron* analysis requires us to
11 consider whether the BIA's interpretation of the statute was
12 reasonable. In rejecting Sui's appeal, the BIA briefly analyzed
13 whether Sui's conviction was properly categorized as an "attempt,"
14 concluding that Sui possessed counterfeit checks with the intent
15 to deceive and that it was irrelevant that no actual fraud
16 occurred.⁸ This discussion does not clearly explicate the manner

⁸ The BIA's analysis on this point, in full, is as follows:

Section 101(a)(43)(U) of the Act provides that the term "aggravated felony" also includes "an attempt or conspiracy to commit an offense described in (section 101(a)(43))." Here, the offense for which the respondent was convicted involves possession of \$22,700 worth of counterfeit securities with the intent to deceive another person or organization. The conviction record shows that the respondent possessed travelers checks with the intent to exchange them with unsuspecting victims for either cash or items of value. The fact that the respondent failed to
(continued...)

1 in which the BIA interpreted "attempt," though it necessarily
2 implies that the BIA concluded that "attempt" as used in
3 subsection (U) need not be limited to convictions under statutes
4 setting out crimes formally labeled "attempts."⁹

5 Sui disputes the appropriateness of this conclusion, arguing th
6 "attempt" must be understood only to refer to the substantive
7 offense of attempt, rather than to convictions for other crimes
8 that might involve facts showing an attempt to commit another
9 listed offense. Nevertheless, to the extent that the BIA's
10 rationale rests on the conclusion that Congress did not intend to
11 allow the INA's definition of "attempt" to vary solely according
12 to the labels applied by the jurisdiction in which an alien was
13 charged, we find it reasonable. As the INS points out, the
14 Supreme Court addressed an analogous issue in *Taylor v. United*

(...continued)

actually defraud another person or organization is of no consequence under section 101(a)(43)(U) of the Act, which prescribes deportability as an aggravated felon for aliens convicted of an attempt or conspiracy to commit an offense described in section 101(a)(43) of the Act. See *Matter of Onyido*, Interim Decision 3379 (BIA 1999).

⁹ This conclusion is consistent with BIA precedent and practice. See, e.g., *In re: Crammond*, Int. Dec. No. 3443, 2001 WL 312775 (BIA March 22, 2001) (finding the definition of "felony" in aggravated felony provision not dependent on state labeling systems); *In re: Rodriguez-Rodriguez*, Int. Dec. No. 3411, 1999 WL 731793 (BIA Sept. 16, 1999) (finding conviction for "indecent with a child by exposure" to constitute "sexual abuse of a minor" under aggravated felony provision).

1 States, 495 U.S. 575 (1990), when it considered whether the term
2 "burglary," as used in a federal sentence enhancement statute,
3 meant "burglary" however a jurisdiction chose to define it, or was
4 instead premised upon a uniform definition of the crime, which
5 might not include some offenses formally labeled "burglary." See
6 *id.* at 579-80. The Court concluded that it was "implausible that
7 Congress intended the meaning of 'burglary' . . . to depend on the
8 definition adopted by the State of conviction," since such a
9 conclusion would mean that exactly the same conduct could have
10 different results for sentencing if state labeling schemes varied.
11 *Id.* at 590. Indeed, the general rule is that unless Congress
12 gives plain indication to the contrary, federal laws are not to be
13 construed so that their meaning hinges on state law, "because the
14 application of federal legislation is nationwide and at times the
15 federal program would be impaired if state law were to control."
16 *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20
17 (1983). We agree that in the aggravated felony context,
18 "[p]ronouncing a flower to be a rose . . . does not necessarily
19 make it one." *Drakes v. Zimski*, 240 F.3d 246, 248 (3d Cir. 2001).
20 Thus, whether or not it would be reasonable for the BIA to
21 interpret the INA as attaching varying immigration consequences to
22 convictions based only on the labels given to them by various
23 jurisdictions, it is clearly reasonable for the BIA to proceed

1 under the theory that the label given to the offense by the
2 charging jurisdiction is not alone determinative of its status as
3 an aggravated felony.

4 If the label given to the offense is not determinative, however
5 the BIA must offer an alternative yardstick by which to determine
6 whether a conviction renders an alien removable under the
7 aggravated felony provision. There is no general statutory
8 definition of criminal "attempt" in the federal system that we may
9 assume the BIA used, but *Onyido*, relied on by the BIA in the
10 present case, provides some insight into the BIA's definition of
11 "attempt." There, the BIA considered a conviction under an
12 Indiana statute that proscribed the presentation of false
13 insurance claims with an intent to defraud. Int. Dec. No. 3379 at
14 2. The BIA noted that the statute did not require proof of loss,
15 and therefore concluded that it encompassed both successful frauds
16 and unsuccessful attempts to defraud an insurance company. *Id.* at
17 3. The BIA then cited an Indiana case involving a conviction
18 under the state's generic attempt statute for the proposition that
19 all that was necessary to show attempt to defraud under Indiana
20 law was an intent to defraud plus the occurrence of a
21 "substantial" step toward the commission of the fraud. *Id.* The
22 BIA concluded that the record of conviction demonstrated that both
23 elements were present in *Onyido's* case. *Id.* at 3-4.

1 It is somewhat unclear whether the BIA meant by this analysis
2 to indicate that it was adopting Indiana's definition of attempt
3 only because this was an Indiana conviction, thus implying that it
4 might apply a different definition of attempt in another case, or
5 whether it meant that the Indiana requirements of intent plus a
6 substantial step were the elements of a generic definition of
7 attempt that it would apply in every such case. Nevertheless, we
8 believe the latter to be the more likely rationale underlying the
9 BIA's *Onyido* decision, given the above-noted preference in
10 statutory construction for avoiding interpretations of federal law
11 that hinge on state law, see *Dickerson*, 460 U.S. at 119-20, and
12 given the BIA's general practice of "apply[ing] a federal standard
13 in determining whether a state offense fits within the aggravated
14 felony definition," *In re: V-Z-S-*, Int. Dec. No. 3434, 2000 WL
15 1058931, at *8 (BIA Aug. 1, 2000). We believe that this generic
16 definition of "attempt" by reference to the presence of criminal
17 intent and the completion of a substantial step toward committing
18 the crime is a reasonable interpretation of the statutory term.

19 Indeed, even were we to conclude that the BIA's consideration
20 of the appropriate definition of "attempt" as used in subsection
21 (U) was not sufficiently reasoned and detailed to command
22 deference, see *Michel*, 206 F.3d at 263 (quoting *Chevron*, 467 U.S.
23 at 865), we would adopt the same definition ourselves. See

1 generally Drakes, 240 F.3d at 250 (finding it unnecessary to
2 determine the level of deference to pay to the BIA's "scant
3 analysis and somewhat barebones conclusion" when the court agreed
4 with the BIA in the result). Given the absence of a general
5 federal statutory definition of attempt, the most likely sources
6 for a generic definition of "attempt" are common law and the Model
7 Penal Code. "The classical elements of an attempt are intent to
8 commit a crime, the execution of an overt act in furtherance of
9 the intention, and a failure to consummate the crime." United
10 States v. Stallworth, 543 F.2d 1038, 1040 (2d Cir. 1976). This
11 court, when previously considering what must be shown to
12 demonstrate attempt, has derived from this classic test a two-
13 pronged inquiry: (1) has the defendant acted with the culpability
14 otherwise required for the commission of the crime he or she is
15 charged with attempting and (2) has the defendant engaged in
16 conduct that constitutes a substantial step toward the commission
17 of the crime and that is strongly corroborative of the actor's
18 criminal purpose? *Id.*; United States v. Ivic, 700 F.2d 51, 66 (2d
19 Cir. 1983), overruled in part on other grounds by National
20 Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).
21 This is substantially the approach undertaken in the Model Penal
22 Code, and represents a standard "more inclusive than one requiring
23 the last proximate act before attempt liability would attach, but

1 less inclusive than one which would make every act done with the
2 intent to commit a crime criminal." *United States v. Jackson*, 560
3 F.2d 112, 118-19 (2d Cir. 1977). The rationale given by this
4 court in adopting a generic definition of "attempt" based on the
5 Model Penal Code's definition would lead us to apply the same
6 definition in this context, as would the rationale given by the
7 Supreme Court in adopting a generic definition of "burglary" in
8 *Taylor* similar to that set forth in the Model Penal Code. 495
9 U.S. at 598-99. As in *Taylor*, the modern meaning of "attempt" has
10 evolved from the classic common-law definition of the term, and
11 the elements of intent and a substantial step toward commission
12 set out in the Model Penal Code make up the most commonly used
13 "attempt" definition today.

14 Having accepted the BIA's interpretation of "attempt" in
15 subsection (U), we must now consider whether the offense for which
16 Sui was convicted "fits within" that definition. *V-Z-S-*, Int.
17 Dec. No. 3434, at *8; see also note 7, *supra*. On this issue, our
18 review is *de novo*. The INS argues that if Sui had succeeded in
19 reaching the Minnesota shopping mall, he would have cashed the 227
20 traveler's checks found in his possession, just as he had already
21 begun to cash other counterfeit traveler's checks during his trip
22 from New York. In making this argument, the INS looks behind the
23 statutory description of the offense and the charging document to

1 facts set out in the PSR regarding Sui's destination and his
2 activity in cashing other counterfeit checks on his trip. But the
3 BIA undertook no such factual examination in its affirmance of the
4 deportation order. It simply stated that "[t]he conviction record
5 shows that the respondent possessed travelers checks with the
6 intent to exchange them with unsuspecting victims for either cash
7 or items of value." This appears to be no more than a gloss on
8 the language in Sui's indictment, which stated that Sui "possessed
9 counterfeited securities of an organization, with intent to
10 deceive another person or organization, specifically, . . .
11 approximately 227 counterfeited Chase Visa traveler's checks."
12 Thus, in contrast to the INS's argument, the BIA seems to have
13 examined only the statutory description of the offense and the
14 language of the indictment in determining that Sui was deportable
15 pursuant to subsection (U).

16 This approach is consistent with both precedent and sound
17 policy. Both reviewing courts and the BIA have applied a
18 categorical approach in this and analogous contexts, generally
19 looking only to the elements of the offense of conviction and not
20 to the factual circumstances of the crime.¹⁰ Again, the *Taylor*

¹⁰ Indeed, while arguably the BIA's decision as to whether to consider the facts underlying Sui's conviction is an interpretation of the INA and thus reviewed under *Chevron*, a decision to undertake a factual examination would be neither
(continued...)

1 opinion provides valuable guidance. There, in considering the
2 application of a sentence enhancement for the defendant's prior
3 burglary conviction, the Supreme Court considered whether the
4 sentence enhancement statute required the sentencing court to look
5 only to the statutory definition of the prior offense, or whether
6 the sentencing court was also permitted to consider other evidence
7 concerning the defendant's prior crime. 495 U.S. at 600. The
8 Supreme Court noted that the relevant statute spoke in terms of
9 "convictions," not crimes "committed," suggesting a focus on the
10 statute of conviction rather than the defendant's actions. *Id.*
11 Similarly, in the present case, § 1227(a)(2)(A)(iii) renders
12 deportable an alien who has been "convicted" of an aggravated
13 felony, not one who has "committed" an aggravated felony. See

(...continued)

reasonable nor entitled to deference, for such an approach is contrary to both BIA precedent and the language of the INA, as well as sound policy. In a closely analogous context, the BIA has held that "the principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction." In re: Pichardo-Sufren, 21 I. & N. Dec. 330, 1996 WL 230227 (BIA 1996). This categorical approach, focusing only on the elements of the offense of conviction rather than the factual circumstances of the crime, is also the only one consistent with the language of the INA, which renders deportable any alien who has been "convicted" of an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii), not any alien who the BIA concludes (in the absence of the protections afforded by a criminal trial) likely committed an aggravated felony. See *Pichardo-Sufren*, 21 I. & N. Dec. 330 (noting that such language "mandates a focus on an alien's conviction, rather than his conduct").

1 note 10, *supra*. The Court noted in *Taylor* that nothing in the
2 legislative history of the sentence enhancement statute suggested
3 a sentencing court would have to undertake factfinding with the
4 result that sometimes a conviction under a particular statute
5 might count toward enhancement and sometimes it might not. *Id.* at
6 601. Here, no legislative history suggests Congress contemplated
7 a similar factfinding role for the BIA or reviewing courts in
8 ascertaining whether an alien had committed an aggravated felony.
9 Finally, the Court in *Taylor* noted that the difficulties involved
10 in a process that looked beyond the record of conviction were
11 “daunting” for a sentencing court, including a possible need to
12 resolve disputed issues of fact and the inequity of imposing a
13 sentence enhancement on a defendant who had pleaded guilty to a
14 single offense as a result of a plea bargain as though he had
15 pleaded guilty to other crimes. *Id.* at 601-02. These
16 difficulties are no less daunting in the present context. In
17 *Taylor*, the Supreme Court concluded that the sentence enhancement
18 statute “generally requires the [sentencing] court to look only to
19 the fact of conviction and the statutory definition of the prior
20 offense,” though the Court noted that in some instances, an
21 indictment or jury instructions might be relied upon if they
22 demonstrated that the jury had been required to find all the
23 elements of the generic offense set out in the sentence

1 enhancement statute. *Id.* at 602. The same conclusion is
2 appropriate here.¹¹ Thus, "[w]e cannot go behind the offense as it
3 was charged to reach our own determination as to whether the
4 underlying facts amount to one of the enumerated crimes." *Lewis*
5 *v. INS*, 194 F.3d 539, 543 (4th Cir. 1999).

6 Sui pleaded guilty to a violation of 18 U.S.C. § 513(a),
7 which provides, "Whoever makes, utters or possesses a
8 counterfeited security of a State or a political subdivision
9 thereof or of an organization, . . . with intent to deceive
10 another person, organization, or government shall be fined under

¹¹ See also, e.g., *Michel*, 206 F.3d at 264 (citing with approval the BIA's practice of taking a categorical approach to determining whether a conviction is a crime of moral turpitude and noting that this promotes uniformity and relieves administrative burdens); *Ye*, 214 F.3d at 1133 (noting that in determining whether a conviction is for a "crime of violence" under the INA, the court generally only looks to the statutory definition of the prior offense, and if necessary, the charging paper and judgment of conviction, but not to the particular facts underlying the conviction); *United States v. Velazquez-Overa*, 100 F.3d 418, 420-21 (5th Cir. 1996) (adopting a categorical approach and refusing to consider the conduct underlying the conviction in determining whether alien should receive a sentence enhancement based on conviction of aggravated felony as defined in the INA); *Hamdan v. INS*, 98 F.3d 183, 187 (5th Cir. 1996) (applying categorical rule in determining whether a conviction is a "crime of moral turpitude" under the INA); *United States v. Reyes-Castro*, 13 F.3d 377, 378 (10th Cir. 1993) (adopting a categorical approach and refusing to consider the conduct underlying the conviction in context of determining that alien had committed an aggravated felony and had been properly deported); *In re: Pichardo-Sufren*, 21 I. & N. Dec. 330, 1996 WL 230227 (BIA 1996) ("[T]he principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction.").

1 this title or imprisoned for not more than ten years, or both.”

2 Generally, courts undertaking a categorical approach look beyond

3 the language of the statute to examine the charging document and

4 the judgment of conviction when the relevant statute includes both

5 conduct that would constitute an aggravated felony and conduct

6 that would not. Cf. *Ye*, 214 F.3d at 1133 (using this approach in

7 determining whether a conviction qualifies as a “crime of

8 violence” under the INA). Because it is conceivable that the

9 determination of whether an alien committed a subsection (U)

10 “attempt” would vary depending on whether he or she had been

11 convicted alternatively of making, possessing, or uttering

12 counterfeit securities, we look to the charging document to

13 determine the particular activity at issue here. The one-count

14 indictment to which Sui pleaded guilty states that on or about

15 February 15, 1997, in the Western District of Wisconsin, Sui and

16 his co-defendant “knowingly and unlawfully possessed counterfeited

17 securities of an organization, with intent to deceive another

18 person or organization, specifically, the defendants possessed

19 approximately 227 counterfeited Chase Visa traveler’s checks, each

20 with a face value of \$100, for a total face value of approximately

21 \$22,700.” By pleading guilty, Sui acknowledged that he possessed

22 the securities with an intent to deceive. Therefore, because the

23 underlying facts of Sui's offense may not be examined, the

1 remaining inquiry is whether simple possession of counterfeit
2 securities constitutes a substantial step toward an offense that
3 involves fraud or deceit and results in a loss to victims of more
4 than \$10,000. Because possession of counterfeit securities with
5 the mental state that Sui acknowledged by his plea to the
6 indictment itself involves fraud or deceit, the only issue is
7 whether Sui's conviction constitutes a substantial step toward
8 causing a loss that exceeds \$10,000.¹²

9 The INS argues that § 513(a) punishes possession of
10 counterfeit documents that can serve no legitimate purpose and
11 that are instead designed to deceive others. It argues that

¹² For the purposes of this analysis, we assume that "intent to deceive" is a sufficient showing of intent for the purposes of demonstrating an attempt to bring about a loss to a victim through a crime involving fraud or deceit. We acknowledge that an intent to deceive is not synonymous with an intent to defraud, since "[d]eceive is to cause to believe the false or to mislead[; d]efraud is to deprive of some right, interest or property by deceit," *United States v. Yermian*, 468 U.S. 63, 73 n.12 (1984), and that an intent to deceive may therefore not include an intent to cause a loss. Nevertheless, this court has previously noted in the context of § 513(a) that it is unclear whether Congress intended any difference in meaning between the phrase "with intent to deceive another person, organization, or government," used in § 513(a), and the phrase "with intent to defraud," used in the majority of the sections of the "Counterfeiting and Forgery" chapter of Title 18, 18 U.S.C. §§ 471-513. *United States v. Thomas*, 54 F.3d 73, 79-80 (2d Cir. 1995). Given this precedent and given that the question has not been raised or briefed in the present case, we will assume that the possible distinction between an "intent to deceive" and an "intent to defraud" is not determinative here.

1 possession of such materials necessarily constitutes a substantial
2 step toward their use to cause a loss exceeding \$10,000, and for
3 this contention cites the Model Penal Code, which states that the
4 "possession of materials to be employed in the commission of the
5 crime, which are specially designed for such unlawful use or which
6 can serve no lawful purpose of the actor under the circumstances,"
7 shall not be held insufficient as a matter of law to constitute a
8 substantial step. Model Penal Code § 5.01(2)(e). In other words,
9 the INS argues for adoption of a bright-line rule in which the
10 possession of more than \$10,000 in counterfeit securities with an
11 intent to deceive automatically constitutes an attempt to cause a
12 loss exceeding \$10,000 through fraud or deceit.

13 Our precedents suggest that we should be hesitant to adopt
14 such a rule, given that "an understanding of the facts is critical
15 to any consideration of inchoate crimes," Stallworth, 543 F.2d at
16 1039, and the bright-line test proposed by the INS would make the
17 underlying facts in any such case irrelevant. Indeed, this court
18 has previously specifically held that whether particular conduct
19 constitutes a substantial step toward commission of a crime is "so
20 dependent on the particular factual context of each case that, of
21 necessity, there can be no litmus test to guide the reviewing
22 courts." United States v. Manley, 632 F.2d 978, 988 (2d Cir.
23 1980). The Model Penal Code language relied upon by the INS is

1 not to the contrary: It simply indicates that in a case such as
2 Sui's the question of whether a substantial step was undertaken
3 should be allowed to go to the jury. It does not indicate that
4 possession of instruments that can have no lawful use *necessarily*
5 constitutes a substantial step toward commission of a crime; it
6 does not set out a litmus test. See generally Ivic, 700 F.2d at
7 68 (noting that this section of the Model Penal Code is intended
8 to be used to decide whether to send a case to the jury and
9 expressing concern that its use in jury instructions could lead a
10 jury to decide that it *must* find a substantial step had been
11 committed if it was convinced of the relevant historical facts
12 beyond a reasonable doubt).

13 It is possible, and even likely, that if Sui had been tried
14 in state court on a charge of attempted fraud instead of mere
15 possession and the prosecution had proven the facts as set out in
16 the PSR, a jury would have found that he had completed a
17 substantial step toward passing the counterfeit traveler's checks
18 and defrauding merchants of more than \$10,000. As it stands,
19 however, there has been no such jury finding. Nor did Sui plead
20 guilty to completing a substantial step toward passing the checks
21 and thereby causing a loss that exceeds \$10,000; he pleaded guilty
22 only to possession with intent to deceive, which is not
23 necessarily equivalent. The INS asks us to assume the position of

1 factfinder, looking behind the statute of conviction and the
2 indictment to determine whether in the particular circumstances of
3 this case, Sui's acts constituted a substantial step. As
4 discussed above, this is an inappropriate role for a reviewing
5 court or for the BIA to undertake, and we decline the invitation
6 to piece together an underlying attempt conviction by weighing
7 evidence and drawing conclusions in a manner appropriate only for
8 a criminal jury.

9 Given that possession of counterfeit securities with an
10 intent to deceive does not necessarily constitute an attempt to
11 pass these securities and cause a loss, and given that we take a
12 categorical approach to determining whether convictions constitute
13 aggravated felonies, we find that Sui has not been convicted of an
14 aggravated felony as defined in subsection (U). Nor may he be
15 deported pursuant to subsection (M)(i) alone, since the loss to
16 victims as a result of his actions did not exceed \$10,000. Sui
17 therefore is not removable as an alien who has committed an
18 aggravated felony. As a result, we have jurisdiction over his
19 petition and exercise that jurisdiction to vacate the BIA's order
20 of removal. We see no need to reach the constitutional arguments
21 raised by Sui.

22 Petition to review granted and order of removal vacated.

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